1980

Committeee of Consumer Services; Parowan Valley Pumpers association, Cedar Valley Pumpers association and Beryl Pumpers association; Enterprise Valley Pumpers , Inc. v. Public Service Commission of Utah; Milly 0. Bernard, Chairman; Kenneth Rigtrup, Commissioner; and Pavid R. Irvine, Commissioner : Brief of Appellants

Utah Supreme Court

JAMES L. BARKER, Attorney for Committee of Consumer ServicesELLIOTT LEE PRATT; Attorney for Protestants, Plaintiffs herein

IN THE SUPREME COURT OF

THE STATE OF UTAH

COMMITTEE OF CONSUMER SERVICES; PAROWAN VALLEY PUMPERS ASSOCIATION, CEDAR VALLEY PUMPERS ASSOCIATION and BERYL PUMPERS ASSOCIATION; ENTERPRISE VALLEY PUMPERS, INC.,	SUPREME COURT CASE NO. 16891
Appellants,	P.S.C.U. CASE NO. 76-023-04
-vs-	
PUBLIC SERVICE COMMISSION OF UTAH; MILLY O. BERNARD, Chairman; KENNETH RIGTRUP, Commissioner; and DAVID R. IRVINE, COMMISSIONER,	
Respondents.	

BRIEF OF APPELLANTS

An Appeal of the Supplemental Report and Order of January 11, 1980, of the Public Service Commission.

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PUBLIC SERVICE COMMISSION OF UTAH; MILLY O. BERNARD, Chairman; KENNETH RIGTRUP, Commissioner; and DAVID R. IRVINE, Commissioner,	
Defendants.	

NATURE OF THE CASE

Appellants seek refund of the amount of the increase in rates for the period February 18, 1977 through May 23, 1978, granted C.P. National Corporation (an electric utility) pursuant to a February 18, 1977, order of the Public Service Commission which was subsequently reversed and remanded by the Utah Supreme Court on December 5, 1978. (Parowan Pumpers Ass'n. v. Public Service Com'n., 586 P.2d 407)

DISPOSITION BEFORE PUBLIC SERVICE COMMISSION

The Public Service Commission denied the requested refund.

RELIEF SOUGHT ON APPEAL

Appellants seek an order of this court requiring the Public Service Commission to determine the amount of the refund and to require C.P. National Corporation to refund said amount to the persons entitled thereto as required by Section 54-7-17(4), U.C.A. 1953.

STATEMENT OF FACTS

In case no. 76-023-04 before the Public Service Commission, C.P. National Corporation (then California Pacific Utilities, hereinafter "C.P.", real party in interest herein) applied for an increase in the rates charged to its customers to recover, inter alia, annual rental expenses for a transmission line owned by Utah Power and Light Company. The transmission line had been constructed by Utah Power and Light Company and part of its capacity was to be used by C.P. to transmit power purchased from Utah Power and Light Company to C.P.'s customers. The line was constructed at an approximate cost of $4,400,000. The rental contract provided that C.P. pay Utah Power and Light Company rental expenses of $856,910 per year over a 45 year period.

A reason advanced by respondent for requiring the new transmission line was the obligation of C.P. to wheel power for the United States Bureau of Reclamation.

The Parowan Pumpers Association appealed the order of the

Public Service Commission granting the increase for which refund is now requested. A stay of the effect of the order was not obtained, nor was a "suspending bond" filed with the Supreme Court. In the decision in that case, this court summarized the facts as follows:

> After a number of public hearings on the proposed rate increase, the Commission found that both the wheeling agreement and the UP&L contract were required by law to be submitted to the Commission for its approval; that neither contract had been submitted, and had never been approved; that neither contract was in the best interest of the public or of the customers of Cal-Pac; that had Cal-Pac not been wheeling power for the Bureau the construction of this new transmission line would not have been necessary; that the Commission had jurisdiction over the rates charged for all intrastate utilities including the wheeling rates; and that the Commission had the power to modify or amend the contracts.
>
> In its order, the Commission nevertheless granted 53.03% of the requested increase and ordered Cal-Pac to negotiate with the Bureau for an increase in the wheeling rate.
>
> The Commission's order is not supported by its findings, and in fact is hostile to them. The findings and order are irreconcilable and that irreconcilability is fatal. The Commission found that the UP&L contract was not in the public interest but based a rate increase on the terms of that contract. The Commission found that the construction of the transmission line was not a necessary expenditure for the purpose of supplying service to the customers of Cal-Pac but granted an increase which requires those customers to pay 53% of the cost of that construction. Also there is no finding that the increase granted is reasonable; on the contrary, the implication of the findings is that the increase is not reasonable.
>
> As we are unable to correlate the findings with the Commission's order, we reverse and remand the case to the Commission to take

> such action, including further hearings, if necessary, as it deems advisable for the purpose of achieving a harmonious relationship between its findings and order. (Parowan Pumpers Ass'n. v. Public Service Com'n., 586 P.2d 407)

Upon remand, both the Parowan Pumpers Ass'n. and the Committee of Consumer Services (Appellants) petitioned the Public Service Commission for an order requiring C.P. to refund to its Utah jurisdiction customers an amount equal to the new revenue collected from those customers pursuant to the reversed order of February 18, 1977. The period subject to the requested refund extends from February 18, 1977 to May 23, 1978, the date on which a new order establishing rates for respondent's Utah customers was entered in case no. 77-023-08. (R-123)

After consolidating case no. 76-023-04 with cases 77-023-05 and 77-023-08, the Public Service Commission proceeded to hear evidence on some of the issues presented in those cases.

Thereafter, the Commission entered its "Supplemental Report and Order' dated January 11, 1980, in case no. 76-023-04. In this "Supplemental Report and Order' the Commission determined that its reversed Order of February 18, 1977, "was inartfully drawn and was hastily issued under the pressures of a heavy caseload of hearings and paper work." (R-124, para. 4 of Findings of Fact)

Having previously entered a finding that the rental expense contract was not in the public interest, the Public Service Commission in its "Supplemental Report and Order" made a finding that the rental expense contract was in the public interest. (R-124, para. 5 of Findings of Fact)

Based on this finding, the Commission "amended" its reversed order of February 18, 1977, "consistent" with its new finding that the rental expense contract was in the public interest. (R-125, Conclusions of Law). The rates established by the "amended" reversed order were then affirmed and the petition for refund was denied. (R-125, 126, of the Order).

ARGUMENT

POINT I

THE LEGISLATURE HAS PROVIDED FOR REFUND TO CUSTOMERS OF REVENUES COLLECTED BY A PUBLIC UTILITY PURSUANT TO AN INVALID ORDER OF THE PUBLIC SERVICE COMMISSION.

It is the contention of appellants that the Public Service Commission by state law had no alternative but to order a refund of revenues collected by C.P. pursuant to an order which was subsequently reversed by the Supreme Court.

Section 54-7-17, U.C.A. 1953, specifically provides that revenues collected by a public utility under authority of an invalid order of the Public Service Commission are to be refunded to the customers from whom they are collected. This, and Section 54-7-16 U.C.A. 1953, set forth the mechanics of obtaining such a refund. Application is made to the Supreme Court for a writ of certiorari (54-7-16). Pending the determination of the writ, the Supreme Court may stay or suspend the appealed order and may require that the disputed revenues be impounded by the court or

placed in a bank or trust company. When the Supreme Court has made its final decision (and in the event the appeal is successful the monies collected by the public utility under authority of the invalid order, together with interest if the disputed funds have been impounded in a bank or trust company, are to be refunded by order of the Public Service Commission to the persons from whom they were collected.

The pertinent provisions contained in the indicated subsections of Section 54-7-17 are as follows (we reprinted the entire Section 54-7-17 for the convenience of the court at the end of the argument on this Section):

> (1) The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, . . .
>
> (1) during the pendency of such a writ the Supreme Court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order. . .
>
> (2) the order suspending the same shall contain a specific finding. . .that great or irreparable damage would otherwise result to the petitioner. . .
>
> (3) In case the order or decision of the commission is stayed or suspended, the order of the court shall not become effective until a suspending bond shall first have been executed and filed. . . .
>
> (3) The Supreme Court, in case it stays or suspends the order or decision of the commission in any matter affecting rates, fares, tolls, rentals, charges or classifications, shall also by order direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may

prescribe, all sums of money which it may collect from any person in excess of the sum such person would have been compelled to pay, if the order or decision of the commission had not been stayed or suspended.

(4) Upon the final decision by the Supreme Court, all monies which the public utility may have collected pending the appeal in excess of those authorized by such final decision together with interest in case the court ordered the deposit of such monies in a bank or trust company, shall be promptly paid to the persons entitled thereto in such manner and through such methods of distribution as may be described by the commission. (emphasis added)

Section 54-7-17 makes it obligatory that a refund be ordered in this matter. An order of the Public Service Commission authorizing an increase in rates was "reversed" by the Supreme Court. Revenues collected by C.P. pursuant to that invalid order should be "promptly paid to the persons entitled thereto in such manner and through such methods of distribution as may be described by the commission." On remand, the Public Service Commission committed error in failing to comply with the requirements of this subsection (4) of Section 54-7-17. The entire text of Section 54-7-17 is as follows:

Stay pending—Conditions—Procedure—Bond—Reparations.— (1) The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ the Supreme Court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision.

(2) No order so staying or suspending an order or decision of the commission shall be made by the Supreme Court otherwise than upon three days' notice and after hearing, and, if

the order or decision of the commission is suspended, the order suspending the same shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage.

(3) In case the order or decision of the commission is stayed or suspended, the order of the court shall not become effective until a suspending bond shall first have been executed and filed with and approved by the commission (or approved, on review, by the Supreme Court) payable to the state of Utah, and sufficient in amount and security to ensure the prompt payment by the party petitioning for the review of all damages caused by the delay in the enforcement of the order or decision of the commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by the order or decision of the commission, in case said order or decision is sustained. The Supreme Court, in case it stays or suspends the order or decision of the commission in any matter affecting rates, fares, tolls, rentals, charges, or classifications, shall also by order direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any person in excess of the sum such person would have been compelled to pay, if the order or decision of the commission had not been stayed or suspended.

(4) In case the Supreme Court stays or suspends any order or decision lowering any rate, fare, toll, rental, charge or classification, the commission upon the execution and approval of such suspending bond shall forthwith require the public utility affected, under penalty of the immediate enforcement of the order or decision of the commission pending the review and notwithstanding the suspending order, to keep such

accounts, verified by oath, as may in the judgment of the commission suffice to show the amounts being charged or received by such public utility pending the review in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the persons to whom overcharges will be refundable, in case the charges made by the public utility pending the review are not sustained by the Supreme Court. The court may from time to time require such party petitioning for a review to give additional security or to increase the said suspending bond whenever in the opinion of the court the same may be necessary to ensure the prompt payment of such damages and such overcharges. Upon the final decision by the Supreme Court all moneys which the public utility may have collected pending the appeal in excess of those authorized by such final decision, together with interest in case the court ordered the deposit of such moneys in a bank or trust company, shall be promptly paid to the persons entitled thereto in such manner and through such methods of distribution as may be prescribed by the commission. If any such moneys shall not have been claimed by the persons entitled thereto within one year from the final decision of the Supreme Court, the commission shall cause notice to such persons to be given by publication, once a week for two successive weeks, in a newspaper of general circulation printed and published in the city and county of Salt Lake, and in such other newspaper or newspapers as may be designated by the commission; said notice to state the names of the persons entitled to such moneys and the amount due each person. All moneys not claimed within three months after the publication of such notice shall be paid by the public utility under the direction of the commission into the state treasury for the benefit of the general fund. (parts underlined are those quoted above)

POINT II.

THE DECISION OF THE SUPREME COURT "REVERSING AND REMANDING" THE ORDER OF THE PUBLIC SERVICE COMMISSION WAS A "FINAL DECISION" WITHIN THE MEANING OF SECTION 54-7-17(4)

Appellants contend that the decision of this court of December 5, 1978, reversing the order of the Public Service Commission of February 18, 1977, was a "final decision" as contemplated

by Section 54-7-17(4), and required the commission to make a refund to customers of C.P. of revenues collected pursuant to that reversed order.

As set forth above, Section 54-7-17(4) provides for a refund of utility revenues collected pursuant to an invalid order of the Public Service Commission. This refund is to be made "upon the final decision by the Supreme Court." The meaning of the term "final decision" in that statute has been construed by this court in the cases of Mt. States Tel. & Tel. v. Public S. Com'n., 142 P.2d 873, and Mt. States Tel. & Tel. v. Public Service Commission, 155 P.2d 184, to mean the opinion by the Supreme Court on the writ of review and not the decision of the entire controversy.

In the first Mt. States Tel. & Tel. case, the Public Service Commission had entered an order reducing toll rates. Mt. States appealed, filed a petition for a stay of the commission's order and posted the required bond. All disputed sums collected by Mt. States were impounded. On appeal, the court said:

> The order of the Commission must be set aside and the matter remanded to the Commission for a determination as to what would be a reasonable and just rate for intrastate toll service. (Mt. States Tel. & Tel. v. Public Ser. Com'n., 142 P.2d 873)

On remand, Mt. States requested that the Commission release to Mt. States the monies in the impounded fund. In answer, the commission contended that the court had merely set aside the commission's order and sent the case back to it for further consideration and proceedings, that any further hearing was merely a continuation of the original case, and that there had been no "final decision" within the purview of Section 76-6-17 U.C.A. 1943 (now 54-7-17, U.C.A. 1953).

The refusal of the Commission to release the impounded fund led to the second Mt. States Tel. & Tel. case. The precise issue was the meaning of "final decision" in the refund statute. In holding that "final decision" referred to the decision of the Supreme Court on the writ of review, only, and not to the determination of the entire controversy, the court was addressing a situation in which the utility was appealing and had obtained the impounding of funds. However, its interpretation of the law is pertinent. It said:

> (8) If the foregoing analysis of the statute be valid, then any contention to the effect that the provision in subsection (3) of Sec. 76-6-17 that the money be "impounded until the final decision of the case," means that it be held until the final decision of the controversy must fail. It is clear to us beyond doubt that such words mean until the final decision of the supreme court. The words"final decision of the case" themselves mean, without any contextual modification, the case in the supreme court—that case or proceeding initiated by petition for a writ of review and concluded by decision of this court.
>
> (9,10) But the contention is made that this court did in fact remand the case to the Commission "for a determination as to what would be a reasonable and just rate for intrastate toll service" and hence that the case is not concluded. The remand, however, was obviously merely formal. Ample authority exists in the Commission to determine reasonable rates. The authority comes from the legislature not from this court. It must be clear that we did not thus offhandedly assume authority which this court has consistently asserted was not by the legislature conferred upon it. Nor does the fact that by the provisions of Sec. 76-3-1, U.C.A. 1943, every unjust and unreasonable charge made by a

utility for services is prohibited and made unlawful, confer authority upon this court to modify an order of the Commission or to uphold an order in part and set it aside in part. This for the reason that the determination of whether a rate or charge is unreasonable or unjust is placed by law in the Commission and not in the courts.

* * *

But in the instant case the question of the disposition of the fund does not hinge alone upon the limited power of review of the order of the Commission. That which prevents us from holding the fund and subsequently distributing it as equity dictates, is the explicit mandate of the legislature, unless it be held that despite such mandate we may nevertheless exercise such jurisdiction. From the analysis heretofore made of the statute in question it seems clear that the legislative intent is: (1) That the fund be made up of the amounts collected by the utility, pending the review, in excess of those fixed by the order of the Commission under review; (2) that upon decision by this court setting aside or affirming the Commission, no further payments are to be made into the fund; (3) that the moneys impounded are to be paid to those entitled thereto, upon final dicision by this court; (4) that such moneys are to be refunded to the rate payer only in case the order or decision of the Commission is affirmed; (5) that the utility has collected no "overcharge" if the order or decision of the Commission be set aside; (6) that if there be no "overcharge" there is no fund to distribute. If such be the legislative intent then, since in the review proceedings we set aside the order of the Commission, there is no fund upon which our equitable powers may operate.

Nor can there be any question that the legislature might specifically provide for disposition of the fund impounded under order of the court. It clearly might prescribe that rates fixed by the Commission

> be not effective until the period for applying for a writ of review shall expire; or, if petition for such writ be made, until final disposition thereof by this court. There seems no reason, therefore, why it might not likewise prescribe that a fund collected upon compliance with a condition prescribed for a stay be released to the utility in case the order of the commission be set aside.
>
> From what has been said it follows that the fund in question is the property of the plaintiff, and it is the duty of the Commission to take the necessary steps to release it. Let the peremptory writ issue as prayed. (Mt. States Tel. & Tel. v. Pub. Ser. Com'n., 155 P.2d 184)

In the present matter, the Supreme Court reversed and remanded the order of the Public Service Commission. This was a "final decision" within the meaning of 54-7-17(4) and triggered the operation of that statute. The Commission was required to determine the amount of the refund, the persons to whom refund should be made, and order that the refunds "be promptly paid to the persons entitled thereto."

In the present case at hand, it was error for the Commission not to proceed as required by the statute.

POINT III.

THE PUBLIC SERVICE COMMISSION CANNOT IMPOSE RETROACTIVE RATES ON UTILITY CUSTOMERS.

When the Supreme Court reverses an order of the Public Service Commission the rates imposed by such order are no longer valid. Such rates cannot be reinstated by an amendment purporting to have retroactive effect. An attempt to so amend a reversed order constitutes retroactive rate making.

As set forth under the Statement of Facts, supra, increased rates in this matter were authorized by a Public Service Commis-

sion order dated February 18, 1977. That order was subsequently reversed and remanded by this court. The reversed order was thereafter without legal affect.

The Public Service Commission atempted to give this reversed order retroactive life by amendment. It amended its previous finding that a rental expense contract was not in the public interest to a finding that such contract was in the public interest. Having made this amendment, the Commission then reinstated the rates established by the reversed order as of the date of said reversed order (February 18, 1977), and not as of the date of the purported amendment (January 11, 1980).

Under Utah statutes, the Public Service Commission cannot impose retroactive rates on utility customers. When the order of February 18, 1977 was reversed, the only valid rates which C.P. could require its customers to pay were those established by the last valid order setting those rates. There was no valid order granting any increase from the date of the reversed order (February 18, 1977) until the date of the next order (May 23, 1978).

Section 54-4-4(1) requires that a hearing be held prior to setting rates and that such rates can only have prospective effect. That Section provides:

> Whenever the commission shall find after a hearing that the rates, . . .charges or classifications, or any of them demanded, observed, charged or collected by any public utility for any service or product or commodity . . .are unjust, unreasonable, discriminatory or preferential, or in anyway in violation of any provisions of law, or that such rates. . . are insufficient, the commission shall determine the just, reasonable or sufficient rates . . .to be thereafter observed and in force and shall fix the same by order. . . . (emphasis added)

The Supreme Court of California (Pac. Tel. & Tel. v. Pub. Serv. Com., 401 P.2d 353), construing Section 728 of that state's statutes (and citing numerous decisions from other jurisdictions) held that the use of the word "thereafter" as used in the Utah statute requires that a rate-making order only have prospective effect.

A discussion of retroactive rate making is found in the case of La. Power & Light v. La. Public Service Com'n., 377 So.2d 1023, where the Louisiana court stated:

> Pervading the utility rate making process is the fundamental rule that rates are exclusively prospective in application and that future rates may not be designed to recoup past losses. Transcontinental & Western Air Inc. v. Civil Aeronautics Board, 336 U.S. 601, 69 S.Ct. 756, 93 L.Ed. 911(1949); Rhode Island Consumers' Council v. Smith, 111 R.I. 271, 302 A.2d 757 (1973); Bebchick v. Washington Metropolitan Area Transit Comm's, 158 U.S.App.D.C. 79 485 F.2d 858 (1973). The rationale of this principle is that the Commission acts in a legislative capacity in exercising its rate making authority; that rate making orders have statutory effect; and, that, as such, they are subject to the rules ordinarily applied in statutory construction. Arizona Grocery Co. v. Atchinson, T. & S. F. Ry., 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 (1932).
>
> The Supreme Court of the United States has also ruled that to accord a rate order retroactive effect, requires "the clearest mandate". Claridge Apartments Co. v. Commission of Internal Revenue, 323 U.S. 141, 65 S.Ct. 172, 89 L.Ed. 139 (1944).
>
> Applicability of the principle of non-retroactivity of rate making orders, has been considered in numerous jurisdictions all of which recognize the rule that statutory authority is an indispensable prerequisite to retroactivity of such orders. City of

Miami v. Florida Public Service Commission, 73 PUR 3d 369 (Fla. 1968); Re City Water Co. of Chattanooga, 84 PUR 3d 287 (Tenn.Pub.Serv. Comm'n, 1970); Democratic Central Committee v. Washington Metropolitan Area Transit Commission, 141 U.S.App.D.C. 79, 436 F.2d 233 (D.C.Cir. (1970); New Rochelle Water Co. v. Public Service Commission, 31 N.Y.2d 397, 340 N.Y.S.2d 617, 292 N.E.2d 767 (1972); New England Telephone & Telegraph Co. v. Public Service Commission, 116 R.I. 356, 358 A.2d 1 (1976); New England Telephone and Telegraph Co. v. Public Service Commission, 362 A.2d 741 (Me. 1976).

In a 1972 case, the Supreme Court of California (City of Los Angeles v. Pub. Ut. Com'n., 497 P.2d 785) discussed a case containing legal questions similar to these here under discussion. The court stated:

> When the rates set in the decision before us are annulled, the only lawful rates are those which were in existence prior to the instant decision. We are satisfied that to permit the commission to fix new rates for the purpose of refunds, as requested by Pacific, would involve retroactive rate making in violation of the principles recognized in Pacific Tel. & Tel. Co. v. Public Util. Comm., supra, 62 Cal.2d 634, 649-656, 44 Cal. Reptr. 1, 401 P.2d 353. The basic conclusion that the rates existing prior to this proceeding are unreasonable as well as the conclusion that increases in rates are justified are both based on the same defective findings. To permit the commission to redetermine whether the preexisting rates were unreasonable as of the date of its order and to establish new rates for the purpose of refunds would mean that the commission is establishing rates retroactively rather than prospectively. (emphasis added)

The attempt of the Utah Public Service Commission to amend its reversed order, and to base retroactive rates on that amendment is void as a matter of law.

POINT IV.

FILING A "SUSPENDING BOND" IS NOT A PREREQUISITE TO OBTAINING A REFUND OF REVENUES COLLECTED BY A PUBLIC UTILITY PURSUANT TO AN INVALID ORDER OF THE PUBLIC SERVICE COMMISSION.

It was urged before the Public Service Commission that a refund could not be granted in this matter because on the original appeal the Appellants had not filed a "suspending bond." It is submitted that the filing of a "suspending bond" is not a prerequisite to obtaining a refund of revenues paid by customers to a utility pursuant to an invalid commission order. A "suspendinging bond" must be filed only if a stay order is requested on the grounds that "great and irreparable damage would. . .result to the petitioner" if the stay is not granted. If no stay is requested, no bond is required. This is clearly established by an analysis of Sections 54-7-16 and 54-7-17, Utah Code Annotated, 1953, as amended.

Section 54-7-16, U.C.A. 1953, provides that an applicant for a rate increase "or any party to the proceeding deeming himself aggrieved. . .may apply to the Supreme Court for a writ of certiorari" to review an order of the Public Service Commission. However, the filing of such a writ "does not of itself stay or suspend the operation of the order." (54-7-17(1))

Section 54-7-17(2) enunciates the only condition under which a commission order may be stayed or suspended. That condition is:

> upon evidence submitted to the court. . . that great or irreparable damage would otherwise result to the petitioner. . .

It is apparent that the legislature did not anticipate that a customer of a public utility would suffer "great or irreparable damage" because of an increase in his monthly utility rates. It is equally apparent that it was anticipated that a utility might suffer such damage if it were to be precluded from collecting millions of dollars in revenue while the legality of an order was being reviewed.

The 1945 case of Mountain States Tel. & Tel. v. Pub.Ser.Com. 155 P.2d 184 (cited under Point II of this argument) illustrates the operation of the Utah law. In that case the order of the Public Service Commission had reduced the rates that could be charged by the utility. The utility appealed the order. Pending appeal, and after filing a "suspending bond," the effect of the order was stayed because of the "great and irreparable damage" the utility might suffer if it were to lose the revenue occasioned by the lower rates during the appeal process. By providing a "suspending bond," the utility was permitted to collect the full amount of its rates which were in effect prior to the commission order rather than the reduced rates required by that order. However, the amount the utility collected in excess of the sum a customer would have been compelled to pay if the order of the commission had not been stayed was impounded pending a decision by this court.

The procedure is set forth in Section 17-7-17(3), U.C.A. 1953. In the event the Supreme Court grants a stay or suspends an order, the court "shall also by order direct the public utility affected to pay into court all sums which may

collect from any person in excess of the sum such person would have been compelled to pay, if the order or decision of the commission had not been stayed or suspended." This is the only provision regarding the necessity of a "suspending bond" in connection with the repayment of revenues collected pursuant to a commission order under appeal. The full text of Section 54-7-17(3) is as follows:

> (3) In case the order or decision of the commission is stayed or suspended, the order of the court shall not become effective until a suspending bond shall first have been executed and filed with and approved by the commission (or approved, on review, by the Supreme Court) payable to the state of Utah, and sufficient in amount and security to ensure the prompt payment by the party petitioning for the review of all damages caused by the delay in the enforcement of the order or decision of the commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by the order or decision of the commission, in case said order or decision is sustained. The Supreme Court in case it stays or suspends the order or decision of the commission in any matter affecting rates, fares, tolls, rentals, charges or classifications, shall also by order direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any person in excess of the sum such person would have been compelled to pay, if the order or decision of the commission had not been stayed or suspended. (emphasis added)

In determining the significance of case law dealing with utility refunds, the wording of the statutes involved is important. The wording of Utah and Colorado laws governing such refunds are

almost identical. The principle difference is that the Colorado statute (40-6-116, C.R.S. 1973, formerly 115-6-16, C.R.S. 1963) places jurisdiction in the district court and the Utah statute (54-7-17) places jurisdiction in the Supreme Court. The same requirements exist as to "suspending bonds."

In the 1972 case of Mountain States Tel. & Tel. v. Pub. Util. Comm., the Colorado Supreme Court addressed the issue of whether or not a "suspending bond" was necessary in refund cases. There the court said (502 P.2d 945, 949 (Colo. 1972)):

> Mountain Bell has emphasized the fact that the 1969 rate order was not suspended under bond during appeal, pursuant to C.R.S. 1963, 115-6-16 (amended in 1969). This statute provides that a party petitioning for review of a rate order may have the order stayed pending appeal after a finding that "great or irreparable damage would otherwise result to the petitioner" and after the party petitioning for review has filed a suspending bond which will ensure the prompt payment "of all damages caused by the delay in the enforcement of the order or decision of the commission." The original version of 115-6-16 (L. 13, p. 498, § 53) is substantially similar to the present section. This original version was interpreted in Denver & S.L.R. Co. v. C.B. & Q.R. Co., 67 Colo. 155, 185 P. 817 (1919), to be permissive only. It was stated that suspension of a Commission order was not a mandatory requirement for appellate review of the order, and that the commission may order restitution in a proper case. Amendments to the original version of the statute do not provide any basis for altering this interpretation. (emph. add.)

It is apparent from the foregoing that a customer of C.P. is not required to post a "suspending bond" in order to obtain a refund of rates paid pursuant to an invalid order of the Public Service Commission.

POINT V.

UTILITY CUSTOMERS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WILL BE VIOLATED IF THEY ARE NOT ALLOWED TO PROCEED WITH THIS APPEAL AND OBTAIN A REFUND.

A basic concept of law is that statutes are not to be construed so as to discriminate between the affluent and the poor. If Section 54-7-17, U.C.A. 1953, is to be construed as requiring customers of "C.P." to file a "suspending bond" in order to obtain a refund of rates paid to "C.P." pursuant to an invalid order of the Public Service Commission, although a stay of the order is not requested, the constitutional rights of those customers will have been violated.

In order to obtain a stay (thus making mandatory the filing of a "suspending bond") a customer would be required to convince the court that he would suffer "great or irreparable damage." (54-7-17(2), U.C.A. 1953) It is problematical that being required to pay increased monthly utility rates would constitute "great or irreparable damage."

However, assuming, arguendo, that "great or irreparable damage" could be shown by a customer, few would be able to afford a "suspending bond." Such a bond would have to be "sufficient in amount and security to ensure the prompt payment by the party petitioning for the review of all damages caused by the delay in the enforcement of the order or decision of the commission, and of all moneys which any person or corporation may be compelled to pay, pending review proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by

the order or decision of the commission, in case said order or decision is sustained." (54-7-17(3) U.C.A. 1953) It is obvious that the cost of a "suspending bond" to a customer would greatly exceed any refund of increased monthly rates he might receive.

Such an interpretation would permit an affluent corporation to obtain relief under the law while denying relief to the unaffluent.

By virtue of a clause in the Fourteenth Amendment of the Constitution of the United States expressly forbidding it to do so, a state may not deny to any person within its jurisdiction the equal protection of the laws. City of St. Petersburg v. Alsup, 77 S.Ct. 680, 353 U.S. 922.

The fourteenth amendment and laws adopted under its authority embody a general policy that all persons lawfully in the United States shall abide in any state on equality of legal privileges with all citizens under non-discriminatory laws. Takahaski v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138

Various broad and sweeping generalizations and statements as to the meaning of this important part of the Constitution have from time to time been enunciated. The guiding principle most often stated by the courts is that the constitutional guarantee of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions. Hartford Steam Boiler Inspection and Ins. Co. v. Harrison, 301 U.S. 459, 57 S.Ct 838

With the above principles as the criteria, the argument is forwarded that a party who cannot afford the bond necessary to participate in a utility appeal may have been denied both the equal protection and due process requirements of the law.

It is generally stated that the Constitution is no respector of the financial status of persons, and the rich and poor alike are to be accorded equal rights under it. Moreover the mere presence of wealth, or lack thereof, in a party or citizen cannot be the basis for valid discrimination. Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479; McPherson v. Blacker, 146 U.S. 1, 13 S.Ct. 3

As to the present case at hand, the practical reality of mandatorily requiring prompt payment by a petitioning party in a utility action is a burdensome, onerous and inequitable one and no rational reason exists to support it.

Under general laws, the requirement of set filing fees, set bond fees in state and federal courts and other various financial obligations for use of the court and administrative systems is rational and the state may legitimately attempt to limit its expenditures. Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848; Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479. Further parties using the courts and administrative systems of the state or federal government should generally be encouraged to assist in allaying portions of such costs. Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172

A very different setting and situation arises though when parties are required to match the costs of a public utilities organization, which may include expenses of attorneys, accountants, management personnel, support staff and countless outside expert witnesses. Matching the bill in advance for such an "expedition" would certainly bankrupt any potential residential consumer or party engaged in small commercial enterprises in the State of Utah.

As long as the state utilizes the criterion of ability to pay as a condition to being allowed to challenge a utility action, and since there is no rational justification in requiring all petitioning parties to pay prior to gaining court access, this court in line with the general pronouncements of the U.S. Supreme Court in the cases of Bodie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780; Lubin v. Panish, 415 U.S. 709, 94 S.ct. 1315, Griffin v. Illinois 351 U.S. 958, 76 S.Ct.585, Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, Gidion v. Wainright, 372 U.S. 335, 83 S.Ct. 792, should conclude that no rational basis exists for mandatorily requiring parties to obtain a suspending bond if they wish to challenge the activities of a utility. This is particularly true when no stay of an order is requested.

POINT VI.

FINDINGS OF FACT 4, 5 AND 6 AND THE CONCLUSIONS OF LAW ARE ARBITRARY, UNSUPPORTED BY EVIDENCE AND CONTRARY TO THE SUPREME COURT DECISION.

A. The Commission merely changed its mind without evidence or justification.

The Commission, in the first hearing, had made extensive Findings of Fact in which it clearly held that the Wheeling Agreement in question had not been submitted to the Commission, had not been approved and that it was not in the best public interest or in the interest of the customers. The Supreme Court commented extensively upon such Findings and concluded that the Order issued by the Commission was inconsistent with said Findings.

The Commission now, in the Order before this Court in Finding No. 4, states as the reason for now reversing its extensive Findings made earlier that,

> "The reason for the inconsistency is that the Findings did not correctly and completely set forth the basis for the Commission's Order. The Report and Order was inartfully drawn and was hastily issued under the pressures of a heavy case load of hearings and paper work. The Commission has carefully deliberated in determining the decision to be made in this case."

The Finding of Fact obviously is not supported by any evidence. The only evidence supporting any Findings was given at the original hearings and was the foundation for the extensive Findings to the effect that the Agreement and thus the increased costs were not in the public interest nor in the interest of the consumers of Cal-Pac, i.e. the Protestants herein. Such a Finding now with the Order affirming same on appeal is thus arbitrary

without any evidence to support same. Without any proper evidence, the Findings and Conclusions of Law simply deprive Protestants of the Findings to which Protestants are entitled and which are necessary under the procedures and under the Constitution of the State of Utah governing such cases. Logan City vs. Public Utilities Commission, 77 Utah 442, 296 Pac. 1006.

B. The Commission's Findings and Order violate the intent of the Supreme Court decision.

The Supreme Court, in its prior decision on this matter, clearly intended that the Commission would abide by its Findings and would make the Conclusions and Order consistent therewith. Several factors lead us to this conclusion.

1. Section 54-7-16 provides,

> "The Findings and Conclusions of the Commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the Findings and Conclusions of the Commission on reasonableness and discrimination..... Upon the hearing, the Supreme Court shall enter judgment either affirming or setting aside the Order or decision of the Commission....."

It is abundantly clear from the detail examination of the Commission's Findings by this Court that there was no intent whatsoever to disturb said Findings. The Findings were clear and were amply supported by the evidence. The Supreme Court simply did not intend to reverse the Findings, and in fact, would not attempt to do this under the statute and under the many cases previously handed down by this Court. Bamburger Electric Railroad Company vs. Public Utilities Commission, 59 Utah 351, 204 Pac. 314; Utah Light and Transit Company vs. Public Service Commission, 101 Utah 99, 118 P.2d 683 and more recently Greyhound Lines, Inc. vs. Public Service Com

2. The language in the Supreme Court Order is clear in evidencing the intent to make the Commission Order conform to the Findings - and not to make the Findings conform to the Order. After reciting its approval of the detailed Findings of Fact, the Supreme Court stated,

> "In its Order, the Commission nevertheless granted 53.03% of the requested increase and ordered Cal-Pac to negotiate with the Bureau for an increase in the Wheeling rate.....
>
> The Commission's Order is not supported by its Findings, and in fact is hostile to them. The Findings and Order are irreconcilable and that irreconcilability is fatal. The Commission found that the U P & L contract was not in the public interest, but based a rate increase on the terms of that contract."

The Supreme Court then invited the Commisson to hold further hearings if necessary to achieve the harmonious relationship between the Findings and Order.

The language seems clear that the Supreme Court intended that the Order be changed to fit the Findings. Any contrary intent would have to have been made upon some determination that the Findings of the Commission were arbitrary or capricious and are not supported by the evidence whatsoever. Obviously, such a decision was not made by the Supreme Court.

Therefore, it is clear that the Commission did not follow the mandate of the Supreme Court in changing the Order to fit the Findings, but to the contrary modified the Findings, without any additional evidence, to fit the Order. Such action on the part of the Commission is arbitrary and without any rational basis whatsoever. The Commission's Findings thus made without proper evidence and based only upon its statement that

it was hurried into making a prior Finding is not a proper basis for depriving the Protestants of their rights and imposing the additional assessments upon them.

CONCLUSION

For the reasons which have been set forth above, Appellants urge this Court to reverse the Report and Order of the Commission authorizing the appropriate refund of all payments made under the prior ruling of the Commission and reversing the Order of the Commission to make it consistent with the Findings of Fact previously made to the effect that the contract with Utah Power and Light was not in the public interest and could not, therefore, be the basis for a rate increase.

The action of the Commission in its Report and Order here under review is not only inconsistent with the statutes, but is clearly arbitrary and deprives the consumers of their property rights without a proper evidentiary hearing.

RESPECTFULLY SUBMITTED, this 24th day of April, 1980.

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